SM_0162_01

28th May 2020

Richard Fidler
South Holland District Council
Priory Road
Spalding PE11 2XE

Dear Richard,

Re: Planning Application H16-0082-20 – Development of 42 No. Affordable Homes at Locksmill Farm, Cowbit Road, Spalding

Further to our recent correspondence, I understand that objections have been made on behalf of a number of local residents regarding our current application for a development of affordable housing at the above site. The objections received can be summarised as follows:

1. The fallback position is invalid, so the scheme falls to be determined solely on the policies of the adopted development plan;
2. There is no need for housing development in this location;
3. No pre-application consultation or public consultation has been carried out;
4. The proposed development is not in keeping with the role and function of the settlement area, residential amenity will be impacted for occupants of the existing surrounding properties, and the design has made no concessions to limit these impacts; and
5. The 2019 Local Plan should be following strictly without interpretation.

Issue 1: The Validity of the Fallback Position

As we have set out in the Planning Statement and in subsequent correspondence, there is a significant fallback position represented by the extant planning permission for 26 no. dwellings on the site with 25% affordable provisions via S106 (ref: H16-1038-17). The comments received have called into question the validity of the fallback position. In order to put this issue beyond doubt, we have sought legal advice from Paul Tucker QC. I enclose the opinion provided by Paul, which concludes that the fallback position in this case is *"plainly established."* As noted in the opinion, in these circumstances *"what then needs to be assessed is the comparative effects of the proposed development compared to the impacts of the 'fall back' consent which is relied upon."* In other words, the Local Planning Authority would err in law if it refused planning permission for the current proposals for reasons that would apply equally to the consented proposals.

Issue 2: The Need for Housing Development

The extant planning permission for 26 units on the site forms part of the Council's established housing land supply which is enshrined in the adopted Local Plan. The site therefore contributes to the supply figures which underpin the SHDC 5-year Housing Land Supply Assessment of 31st March 2019. In light of historic under-delivery in the plan area, the purported supply of 6.07 years under the Liverpool method is marginal, and is highly vulnerable to the acknowledged risks of existing permission not being implemented and windfall contributions falling below expectations.

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The Housing Delivery Test result for South Holland published in February 2019 was 71%, substantially below the 85% threshold triggering the 5YS 20% buffer requirements, as well as requiring the Council to publish a HDT Action Plan. The Action Plan, published in August 2019, makes clear the urgent need for the authority to ensure the supply from extant planning permissions, maximise the potential contribution from windfall sites, and prevent sites from becoming 'stuck and stalled'. The need for affordable housing is particularly acute, and the delivery of affordable homes in 2016/2017 was the lowest for 5 years.

We received advice on 28 January 2020 from SHDC Housing regarding the latest information on housing need, which informed the design and housing mix of the current scheme. The Objectively Assessed Housing Need establishes a requirement for 282 new affordable homes per annum. As of January there were 150 applicants on the Housing Register for Spalding alone. The pipeline for the period 2019-2020 includes only approx. 76 new affordable homes, and none of these are in Spalding. For the period 2020-2021 the housing team were forecasting approx. 150 affordable homes to be delivered based on consents and allocations, of which only 20 are in Spalding. Assuming that this projection is achieved and ignoring the likely growth in need, there will be a shortfall of 414 units against the 2-year year requirement of 564 units, and a shortfall of 130 affordable homes in Spalding compared to the Housing Register as it stood in January 2020. This situation can only be described as an acute crisis in the availability of affordable housing. There is an overwhelming need to secure new affordable homes in Spalding at any opportunity.

Seeking to prevent the proposed development would therefore undermine the strategic aims of the development plan, and would be untenable in light of the Council's 2019 Housing Delivery Test result and the current severity of need for affordable housing in Spalding. Given the level of need, the proposed increased provision of housing on the site, which comprises 100% affordable homes, should be viewed as a material consideration to which very significant weight should be afforded in favour of planning permission being granted.

Issue 3: Pre-Application and Public Consultation

The proposals were discussed prior to submission with officers of the Council including officers in the SHDC Housing Team who have confirmed the need for the proposed affordable housing and provided advice to ensure that the proposed housing mix, type and tenure reflect identified need at the local level. We agree that public consultation should not have been a pre-requisite for validation in this case, given the clearly established fallback position and the general similarities in layout, massing and impacts on residential amenity between the extant planning permission and the current proposals.

Issue 4: Design, Character and Residential Amenity

A comparison of the current proposed layout (drawing ref: 011906-PD02) and the approved indicative site layout (drawing ref: 031705-PD02) demonstrates clearly that the current proposals closely reflect the layout, scale and massing of the approved development. Proposed blocks of residential units occupy the same areas of the site, and the scheme occupies a very similar visual envelope. The increased provision of affordable housing has been secured by reducing the size of units and providing semi-detached and terraced units rather than detached units. Plots 22-32 are marginally closer to shared residential boundaries compared to approved Plots 13-20, but these still retain very comfortable separation distances which are well above typically accepted thresholds for residential areas. The scheme does not result in any unacceptable overlooking, overshadowing, overbearing or loss of privacy to existing dwellings. It will achieve a good standard of residential amenity for both existing residents and future occupants of the scheme. In no respect does the currently proposed

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scheme introduce any feature which is not already present in the approved development which can reasonably be found to detract from local character or design quality. There are no material grounds for objection, and no conflict with relevant policies of the development plan, in respect of these issues.

Issue 5: The Legal Basis for Decision Making

The summary of objections received states that *"the 2019 Local Plan must be strictly followed, with each criteria met to the letter, in full without any open interpretation."* This is the wrong approach to decision making in planning, and would be unlawful if applied. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires that applications for planning permission must be determined in accordance with the development plan, unless material considerations indicate otherwise.

In this case there is an existing planning permission for development of a similar layout, arrangement and massing on the site. The accompanying legal opinion has clarified that the extant permission represents a clearly established fallback position, and therefore what needs to be assessed is the comparative effects between the proposed development and the fallback scheme. We have demonstrated that the current proposals do not introduce any impacts compared to the approved development which would be materially harmful, contrary to development plan policy, or that in any way would justify a cogent reason for refusal.

The only substantive material difference between the current proposals and the extant permission is that the current proposals will secure the delivery of 42 affordable homes, whereas the extant permission would secure only 6. It is inconceivable, particularly in light of the urgent need for affordable housing, that this aspect of the proposed development could justify a reason for refusal. On the contrary, it forms a material consideration which lends very substantial additional weight in favour of approval.

When the proper approach to decision making is applied, it is clear that the scheme does not contradict any policies of the 2019 Local Plan. In fact, the delivery of housing on the site, with any uplift in density that may be secured, is essential to achieving the supply figures which underpin the development plan, to achieving the aims of the Housing Delivery Test Action plan and to alleviating the acute crisis in the availability of affordable housing in Spalding.

For these reasons we consider that the planning balance in this case falls overwhelmingly in favour of approval, and great care must be taking in the consideration of the objections raised, as their adoption could result in an error in law. Furthermore we consider that – as the consultation responses taken as a whole do not set out any valid material objections to the proposals, and the scheme has been shown to be in accordance with the development plan – it is appropriate for the application to be determined under delegated powers.

I trust that these comments will be of assistance. If you have any further queries, please do not hesitate to contact me at your convenience.

Yours sincerely,

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RE: LAND AT COWBIT ROAD, SPALDING LINCOLNSHIRE

OPINION

1. Introductory Matters

1.1 On 5th March 2019, South Holland District Council, in its capacity as local planning authority ('LPA'), granted planning permission (ref: H16-1038-17) to develop 26 dwelling houses on land known as Locksmill Farm Including Travel Stop Motel Cowbit Road Spalding Lincolnshire ('the Site'). 25% of the units were intended to comprise affordable housing. The site has been assumed to be likely to be delivered within the next 5 years by the Council's assessment of its current housing supply.

1.2 Minster Property Group have now acquired a controlling interest in most of the Site and on 31st January submitted an application for planning permission for 42 affordable dwellings (ref: H16-0082-20). The Site no longer includes the Travel Stop Motel. The application has been the subject of internal and external consultation. The Planning Policy consultant has raised no objection and concluded that the proposals accord with the policy 11 of the Local Plan as a rural exception site for affordable housing. The Housing Strategy officer's response is also broadly favourable, which is perhaps unsurprising given the provision in excess of the policy minimum on this site.

1.3 Nonetheless an issue has arisen as to whether the extant consent comprises a 'fall back' such as to warrant a comparison between its impacts and the proposed development as a material consideration in respect of the latter application. The ward councilor has 'called in' the application to be dealt with by full committee in the light of representations from third parties, which have been summarised in an email to those instructing me from the case officer dated 30th April 2020. That includes the following:

"The claims of extant permission are invalid due to the change of Development Boundary and site access point. The exclusion of the Travel Stop Motel has radically altered the site. This was not made in any way clear in the Developers Design and access statement or picked up by the Planning Policy Consultant.

Policy 19 must be engaged, and this considered a full new application as a Rural Exception site."

1.4 I am asked to advise.

2. Legal Principles

2.1 It is a well-established principle that there are certain circumstances when it is material to consider the use to which land could lawfully be put in the event that a planning application is not otherwise granted, and in particular to compare the land use implications of the proposed use and that "fall-back" use. In **PF Ahern (London) Limited -v- The Secretary of State for the Environment and Havering Borough Council [1998] Env. LR 189** a challenge was made to an Inspector's decision that she had not considered or given weight to the fallback position at all. Christopher Lockhart-Mummery QC sitting as a deputy High Court Judge observed:

"I have before me evidence that at the inquiry there was challenge, by way of cross-examination from the Council, as to these propositions. There was challenge as to whether the haulage use would actually be carried on. There was challenge as to whether the recycling operations were realistic, and there was challenge whether such uses would be more valuable than the alternative provision of housing. Upon the basis of these challenges it was submitted, on behalf of the Council, in closing submissions at the inquiry, that there was a "mere possibility" of these alternative uses being undertaken.
There have been many decisions of this Court over the last two decades on this topic. The cases are assembled in Mr George's skeleton argument. The principal cases are ...Snowden v the Secretary of State for the Environment [1980] JPL 749, Burge v the Secretary of State for the Environment [1988] JPL 497, ...
From these cases Mr George drew ***three propositions for tests*** *which it is necessary, in his submission, for the decision-maker to apply:*

- *first, whether there is a fall-back use, that is to say whether there is a lawful ability to undertake such a use;*
- *second, whether there is a likelihood or real prospect of such use occurring.*
- *Third, if the answer to the second question is "yes" a comparison must be made between the proposed development and the fall-back use.*

....
The requirement to have regard to the consideration imports a requirement on the decision-maker to have before it sufficient material so that the consideration can be assessed. In the context of fall-back cases this all reduces to the need to ask and answer the question: is the proposed development in its implications for impact on the environment, or other relevant planning factors, likely to have implications worse than, or broadly similar to, any use to which the site would or might be put if the proposed development were refused? ***By "might" I do not mean a mere theoretical possibility which could hardly feature in the balance (see, especially, the Brentwood case). For a fall-back suggestion to be relevant there must be a finding of an actually intended use as opposed to a mere legal or theoretical entitlement.****".* (emphasis added)

2.2 In the subsequent case of Mansell v Tonbridge [2016] EWHC 2832 (Admin), the High Court endorsed the approach in Ahern (supra), and added that a fall back might

lawfully exist even if it required a further planning permission to be secured (in that case for operational development to create a car park):

"17. It is common ground between the parties that the relevant legal principles relating to fall back were set out in R v Secretary of State for the Environment and Havering BC [1998] EnvLR 189 . In that case Mr Lockhart-Mummery QC, sitting as a Deputy High Court Judge, accepted submissions that there were three elements to the fall back test:

> *"First whether there is a fall back use, that is to say whether there is a lawful ability to undertake such a use; secondly, whether there is a likelihood or real prospect of such occurring. Thirdly if the answer to the second question is "yes" a comparison must be made between the proposed development and the fall back use."*

...
40. ..., the Council does not have to shut its eyes to the fact that the proposed development might include elements that required planning permission. ... The building could be converted, so as to provide dwelling houses limited in floor space to 450m2, by the construction of internal walls without using the whole of the internal space of the barn.

41. In my judgment therefore, ***it would have been unrealistic to have concluded that, were the present application for permission to be rejected, the interested party would do nothing to develop this site****. **On the contrary it was plain that development was contemplated and that some development could have taken place** pursuant to Class Q. The Council was entitled to have regard to the fact that there might be separate applications for permission in respect of some elements of the scheme and to advise that appropriate regard must be had to material planning considerations including the permitted development fall-back position."*
(emphasis added)

3. Discussion

3.1 As noted above, to be a material consideration (and therefore a comparator), a fall back has to be lawful and there has to be a more than fanciful prospect of it coming forward if consent is not granted. If there is a 'realistic prospect' of the fall back consent being taken up then the weight to be afforded to it depends upon the probability of such an eventuality. What then needs to be assessed is the comparative effects of the proposed development compared to the impacts of the 'fall back' consent which is relied upon.

3.2 My very clear instructions are that in the event that consent is not granted for the current scheme then the landowner will emphatically not allow the extant to lapse and will seek to bring it forward as soon as practicable. The fact that the land occupied by the motel is not controlled by Minster is a matter of little moment. Whilst the consented access road runs across its land there is no technical reason why an access could not be sought on the land which is controlled by Minster (as is demonstrated by the current application). Moreover none of the conditions of the extant consent mean that delivery can only take place if all of the red edge is controlled by the same developer.

3.3 In any event it is simply unarguable to contend that the very low threshold for materiality of a fall back is other than established in this case. Whilst it may be that a further consent for an amended access may need to be secured in due course – that is not a precondition for making a lawful start on site, and there appears to be no technical reason why such an amended access could not be secured.

3.4 In the circumstances the fall back is plainly established in this case and the LPA would be wrong in law to disregard the extant consent when considering the current proposals.

4. Conclusions

4.1 I advise accordingly. Should anything else arise please do not hesitate to contact me further.

[redacted]

Kings Chambers
36 Young Street
Manchester M3 3FT

Paul G Tucker QC

17th May 2020